

1 Michael D. Kinkley  
2 MICHAEL D. KINKLEY P.S.  
3 N. 4407 Division, Suite 914  
4 914 NORTHTOWN OFFICE BD.  
5 Spokane Washington 99207  
6 (509) 484-5611

7 Class Counsel

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

OCT 22 2001

JAMES R. LARSEN, CLERK  
DEPUTY  
SPOKANE, WASHINGTON

8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF WASHINGTON

10 MICHAEL P. CAMPION, on behalf of )  
11 himself and all others similarly situated; )  
12 Plaintiffs, )

13 v. )

14 CREDIT BUREAU SERVICES, INC. )  
15 (a Washington Corp.), DARLENE M. )  
16 BRIGHT and JOHN DOE BRIGHT )  
17 (Wife and Husband), and THOMAS J. )  
18 MILLER and JANE DOE MILLER )  
19 (Husband and Wife); )

20 Defendants.

Case No.: CS-99-0199-EFS

PLAINTIFF'S MEMORANDUM IN  
SUPPORT OF SUMMARY  
JUDGMENT

21 I. ADOPT COURT RULINGS RE Mr. CAMPION FOR *CAMPION* CLASS

22 The Plaintiff Michael Campion on behalf of the members of the class  
23 requests that the court extend to the class the determinations made in the  
24 September 20, 2000, *Order Granting in part and Denying in part...Parties cross*  
25 *motions for Summary Judgment; Campion v. Credit Bureau Servs.*, 2000 U.S. Dist.  
LEXIS 20233, \*45 (E.D.Wash., Sept. 20, 2000).

PLAINTIFF'S MEMORANDUM IN  
SUPPORT OF SUMMARY JUDGMENT - 1

MICHAEL D. KINKLEY P.S.  
N. 4407 Division, Suite 914  
914 NORTHTOWN OFFICE BD.  
Spokane Washington 99207  
(509) 484-5611

1 to the class. "Prior decision of legal issues should be followed unless there is  
2 substantially different evidence at a subsequent trial, new controlling authority, or  
3 the prior decision was clearly erroneous and would result in injustice. *Kimball v.*  
4 *Callahan*, 590 F.2d 768, 772 (9th Cir.), cert. den. 444 U.S. 826, 100 S. Ct. 49, 62  
5 L. Ed. 2d 33 (1979); *Handi Inv. Co. v. Mobil Oil Corp.*, 653 F.2d 391, 1981 U.S.  
6 App. LEXIS 18637 (9th Cir. Cal. 1981); *White v. Murtha*, 377 F.2d 428 (5th Cir.  
7 1967); *Ballard v. Equifax Check Servs.*, 158 F. Supp. 2d 1163, 2001 U.S. Dist.  
8 LEXIS 12841 (E.D. Cal. 2001)(applying summary judgment determination made  
9 for individual pre-certification to the class)

10 The Plaintiff Michael Campion on behalf of the members of the class requests  
11 that the court extend to the class the determinations made in the September 20,  
12 2000, *Order Granting in part and Denying in part...Parties cross motions for*  
13 *Summary Judgment; Campion v. Credit Bureau Servs.*, 2000 U.S. Dist. LEXIS  
14 20233, \*45 (E.D.Wash., Sept. 20, 2000):

- 15 1. The facts stated in I. Background. pp 2-5
- 16 2. That Credit Bureau Services Inc, Darlene Bright, and Thomas Miller are
- 17 each debt "collectors" as defined by 15 USC 1692(a)(6). pp 11-13.
- 18 3. That Class members are "consumers".(Defendants have agreed to stipulate
- 19 to this point), see p.14.
- 20 4. That defendant CBS is liable for the actions of its agents Bright and Miller.
- 21 pp 15-16.
- 22
- 23
- 24
- 25

- 1 5. The factual findings and determination that the use of the word "judgment"  
2 was a false statement in the affidavits for garnishment in violation of 15  
3 USC 1692e(2)(A) by Defendants CBS, Bright and Miller. pp 16-22
- 4 6. That the inclusion of fees and costs from Writ A in an affidavit for Writ B  
5 without first obtaining a judgment for Writ A is violation of 15 USC  
6 1962e(2)(A) and USC 1692f(1), by Defendants CBS, Bright and Miller. pp.  
7 30-32
- 8 7. That defendants are liable for damages under 15 UCS 1692k as a result of  
9 the violations of the FDCPA. pp 32-34
- 10 8. That defendants a CBS violated RCW 19.16.250(14) and (15). pp 36-37
- 11 9. That defendants CBS and Bright are liable for violation of Washington  
12 Consumer Protection Act, 19.86. et seq. and remedies pursuant to RCW  
13 19.86.090 should be applied. pp 36-39.
- 14 10. That it was the defendants, not the state court clerk that initiated collection  
15 activities. That state court clerk merely carried out her duties. p. 44. Line 9-  
16 12.

17 While a judgment has not yet been entered the principles and policy behind  
18 "issue preclusion" are appropriate for consideration in determining whether t apply  
19 the prior ruling of the court. Collateral estoppel, or issue preclusion, bars the  
20 relitigation of issues actually adjudicated in previous litigation between the same  
21 parties." *Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024, 2001 U.S. App. LEXIS  
22 17218, 2001 Cal. Daily Op. Service 6635, 2001 D.A.R. 8143, 2001-2 Trade Cas.  
23 (CCH) P73374 (9th Cir. Cal.; quoting *Kamilche Co. v. United States*, 53 F.3d  
24 1059, 1062 (9th Cir. 1995), as amended, 75 F.3d 1391 (9th Cir. 1996) (internal  
25

1 quotation omitted). It precludes relitigation of both issues of law and issues of fact.  
2 *Steen v. John Hancock Mut. Life Ins. Co.*, 106 F.3d 904, 910 (9th Cir. 1997). The  
3 party asserting collateral estoppel must show that the estopped issue is identical to  
4 an issue actually litigated and decided in the previous action. *Kamilche*, 53 F.3d at  
5 1062.  
6

7 Preclusive force attaches only to issues that were necessary to support the  
8 judgement in the prior action. *Resolution Trust Corp., v. Keating*, 186 F.3d 1110,  
9 1115 (9th Cir. 1999). Litigants are not precluded from relitigating an issue if its  
10 determination was merely incidental to the judgment in the prior action. *Id.*  
11

12 Only those issues in the first proceeding that are relevant in the second proceeding  
13 are admissible. See *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190,  
14 225 (9th Cir. 1964). The court has the duty, as it does with the admission of all  
15 evidence, to determine what is probative to the proceeding at hand and can exclude  
16 matters that are irrelevant. See *id.*  
17  
18

## 19 II. GARNISHMENT AFFIDAVIT "CAUSES" VIOLATES WCPA

### 20 Elements of WCPA Cause of Action

21 To prevail on a Washington Consumer Protection Act (WCPA), RCW  
22 19.86. et seq. claim, a plaintiff must prove each of the following five elements: (1)  
23 that the defendant engaged in an unfair or deceptive act or practice, (2) occurring  
24 in trade or commerce, (3) that affects the public interest, and (4) causes injury (5)  
25

1 to plaintiff in his or her business or property. *Hangman Ridge Training Stables,*  
2 *Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 780, 719 P.2d 531 (1986).

3  
4 The first 3 elements of the WCPA have previously been established by the  
5 Plaintiffs. See § I. above. Defendants dispute only the fourth and fifth elements i.e.  
6 that defendants conduct “caused an injury to property” of members of the class.

7 The fourth [733 P.2d 211] prong of the *Hangman Ridge* test is that class members  
8 must be injured in their business or property. This requirement is based on *RCW*  
9 *19.86.090*, which uses the term “injured” rather than suffering “damages.” “This  
10 distinction makes it clear that no monetary damages need be proven, and that  
11 nonquantifiable injuries, such as loss of goodwill would suffice for this element of  
12 the Hangman Ridge test.” *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 740,  
13 733 P.2d 208, (Wash. 1987). “This is bolstered by the fact that the act allows for  
14 injunctive relief, clearly implying that injury without monetary damages will  
15 suffice.” *Id.*

16  
17  
18  
19 The fifth prong of the Hangman test is causation. “The causal link must exist  
20 between the deceptive act (the inflated appraisal) and the injury suffered. *Schmidt*  
21 *v. Cornerstone Investments, Inc.*, 115 Wn.2d 148, 167-168, 795 P.2d 1143 (Wash.  
22 1990); citing *Travis*, at 407, 759 P.2d 418; *Nordstrom, Inc. v. Tampourlos*, 107  
23 Wash.2d 735, 741, 733 P.2d 208 (1987).  
24  
25

1 The first prong of proximate cause is cause in fact. *Schooley v. Pinch's Deli*  
2 *Market, Inc.*, 134 Wash.2d 468, 478, 951 P.2d 749 (1998). "Cause in fact concerns  
3 'but for' causation, events the act produced in a direct unbroken sequence which  
4 would not have resulted had the act not occurred." *Hertog v. City of Seattle*, 138  
5 Wash.2d 265, 282-83, 979 P.2d 400 (1999). The question of cause in fact is  
6 normally left to the jury, however, if "reasonable minds could not differ, th[is]  
7 factual question[ ] may be determined as a matter of law." *Id.* at 275, 979 P.2d  
8 400. *Kim v. Budget Rent A Car Sys.*, 143 Wn.2d 190, 143 Wn.2d 191, 15 P.3d  
9 1283, 2001 Wash. LEXIS 73 (2001)

10  
11  
12  
13 Legal cause is the second prong of proximate causation and "[is] a question  
14 of law" for the court. *Id.*; *McCoy v. Am. Suzuki Motor Corp.*, 136 Wash.2d 350,  
15 359, 961 P.2d 952 (1998).

16  
17 Legal causation is a much more fluid concept [than cause in fact]. It  
18 is grounded "in policy determinations as to how far the consequences of a  
19 defendant's acts should extend." The focus in legal causation analysis is on  
20 "whether, as a matter of policy, the connection between the ultimate result  
21 and the act of the defendant is too remote or insubstantial to impose  
22 liability." This inquiry depends upon ' "mixed considerations of logic,  
23 common sense, justice, policy, and precedent.' "

24 *Tyner v. Dep't of Soc. & Health Servs.*, 141 Wash.2d 68, 82 1 P.3d 1148 (2000)  
(quoting *Schooley*, 134 Wash.2d at 478-79, 951 P.2d 749).

1 All members of the class and Mr. Campion suffered an injury to property  
2 caused by the filing of a false affidavit by the defendants. The Washington  
3 Garnishment statute *requires* the court clerk to issue a Writ of Garnishment if the  
4 judgment creditor makes a statutorily sufficient application. *RCW 6.27.070*; *see*  
5 *RCW 6.27.060(requirements of application)*. The clerk "shall immediately issue  
6 and deliver a writ of garnishment in the form prescribed in *RCW 6.27.100*." *RCW*  
7 *6.27.070*. The writ statutory form requires the garnishee to withhold money or  
8 property from the class member.

11 The defendants are using the power of the state courts to take money or  
12 property from the class member. *See Sniadach v. Family Fin. Corp.*, 395 U.S.  
13 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969). The state statute attempts to comply  
14 with due process by requiring a *specific* sworn statement from the judgment  
15 creditor. *RCW 6.27.060*.

18 The element of the sworn statement is in place to reduce the likelihood of  
19 wrongful deprivation. *See Connecticut v. Doeher*, 501 U.S. 1, 115 L. Ed. 2d 1, 111  
20 S. Ct. 2105 (1991) (applied the three-part inquiry of *Mathews v. Eldridge*, 424  
21 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976), in order to determine whether  
22 Connecticut's attachment statute satisfied due process); *Tri-State Dev. v. Johnston*,  
23 160 F.3d 528, 1998 U.S. App. LEXIS 27787, 98 Cal. Daily Op. Service 8081, 98  
24  
25

1 D.A.R. 11267 (9th Cir. Wash. 1998)( Washington pre-judgment attachment statute  
2 RCW 6.25. is unconstitutional as applied).

3  
4 This is an important constitutional consideration since the deprivation of the  
5 property or money is being done without prior notice or an opportunity to be heard  
6 by the class member/judgment creditor. *Id.* The specific sworn statement required  
7 from the judgment creditor includes the *amount* due under an *existing* unsatisfied  
8 or partially unsatisfied *judgment*. RCW 6.27.060. Under a constitutional analysis  
9 whether a prior *judgment* exists for an attachment without prior notice or  
10 opportunity to b heard is an important consideration.  
11  
12

13 The defendants in this case filed a false affidavit claiming a “judgment” for  
14 an amount that was not the judgment amount due. In an unbroken sequence of  
15 events: the clerk would not issue a writ of garnishment *but for* the false affidavit,  
16 the garnishee would not withhold the money or property of the class member *but*  
17 *for* the writ issued based upon the false affidavit.  
18

19  
20  
21  
22  
23  
24  
25  

### III. DEFENDANT CBS VIOLATED WCAA

For the reasons expressed in the court’s September 20, 2000, *Order*  
*Granting in part and Denying in part...Parties cross motions for Summary*  
*Judgment*, at pp36-38, the defendant have violated the Washington Collection  
Agency Act specifically RCW 19.16.20(14) and (18).

1 IV. DEFENDANTS CBS and BRIGHT VIOLATED THE WCPA

2 For the reasons expressed in the court's September 20, 2000, *Order*  
3 *Granting in part and Denying in part...Parties cross motions for Summary*  
4 *Judgment*, at pp38-39, and as discussed in § II. Above, defendants Bright and  
5 CBS have violated the Washington Consumer Protection Act, RCW 19.86.090.  
6

7  
8 V. DEFENDANTS ARE LIABLE FOR ACTUAL DAMAGES  
9

10 Defendants are liable for actual damages. Defendants CBS, Miller and  
11 Bright are liable for actual damages pursuant to the FDCPA, 15 USC 1692k .  
12 Defendants CBS and Bright are liable for actual damages pursuant to the WCPA,  
13 RCW 6.27.090.  
14

15 A. BOTH ACTUAL AND STATUTORY DAMAGES  
16 ARE SOUGHT FOR VIOLATIONS OF THE FDCPA.  
17

18 Mr. Campion and the class seek a recovery of both actual and statutory damages  
19 for defendants' violations of the FDCPA.

20 The FDCPA provides:

21 (a) Except as otherwise provided by this section, any debt collector who fails  
22 to comply with any provision of this subchapter with respect to any person is  
liable to such person in an amount equal to the sum of--

23 (1) any actual damage sustained by such person as a result of such failure;

24 (2)(A) in the case of any action by an individual, such additional damages as  
25 the court may allow, but not exceeding \$1,000; or

1 (B) in the case of a class action,  
2 (i) such amount for each named plaintiff as could be recovered  
under subparagraph (A), and  
3 (ii) such amount as the court may allow for all other class  
4 members, without regard to a minimum individual recovery, not to exceed  
the lesser of \$500,000 or 1 per centum of the net worth of the debt collector;  
5 and . . .

6  
7 15 U.S.C. §1692k. See: *Campion v. Credit Bureau Servs.*, 2000 U.S. Dist. LEXIS  
20233, \*45 (E.D.Wash., Sept. 20, 2000).

8  
9 For example, "[t]he trial judge awarded Keele \$ 1,000 in statutory damages,  
10 the Colorado Legal Aid Foundation \$ 4,000 in statutory damages as a cy pres  
remedy for the settlement class, \$ 14,250 of actual damages to the class, and \$  
11 17,500 to Keele's attorneys for fees and costs." *Keele v. Wexler*, 149 F.3d 589, 592  
12 (7th Cir. 1998). In *Ballard v. Equifax Check Services, Inc.*, 158 F.Supp.2d 1163,  
13 2001 U.S. Dist. LEXIS 12841, \*33 (E.D.Cal. 2001), the district court held that  
14 defendant debt collector was liable for actual damages for its FDCPA violations.  
15 "For violations of the FDCPA, CEA is liable for actual damages consisting of  
16 foreseeable out-of-pocket expenses incurred by check writers in responding to  
17 CEA's demands, including the amount which CEA collected above the face  
18 amount of each check, plus pre-judgment interest, for all payments demanded or  
19 made on or after January 1, 1994." *Irwin v. Mascott*, 112 F.Supp.2d 937, 955  
20 (N.D.Cal. 2000).

21  
22 Various district courts within the Ninth Circuit have certified FDCPA cases  
23 as class actions for the recovery of both actual and statutory damages. *Connor v.*  
24 *Automated Accounts, Inc.*, 2001 U.S. Dist. LEXIS 10458 (E.D.Wash. 2001);  
25 *Littledove v. JBC & Assocs.*, 2001 U.S. Dist. LEXIS 139, \*15-\*16 (E.D.Cal., Jan.  
10, 2001); *Irwin v. Mascott*, 186 F.R.D. 567 (N.D.Cal. 1999), 112 F.Supp.2d

937(N.D.Cal. 2000) (Plaintiffs' motions for partial summary judgment for actual and statutory damages, restitution, and interest and a preliminary injunction were granted), *Price v. Surety Acceptance Corp.*, 1999 U.S. Dist. LEXIS 22418, \*24-\*25 (D.Ariz. 1999); *Ballard v. Equifax Check Services, Inc.*, 186 F.R.D. 589, 594 and 600 (E.D.Cal. 1999).

Mr. Champion and the class are also entitled to an award of statutory damages pursuant to the FDCPA. 15 U.S.C. §1692k(a)(2)(B). An amount of up to \$1,000 may be awarded to Mr. Champion on and up to 1 percent of the net worth of each defendant may be awarded to the class. Net worth is measured as the book value of each defendant. *Saunders v. Jackson*, 209 F.3d 998 (7th Cir. 2000). Thus, it is appropriate for the Court to award Mr. Champion and the class both actual and statutory damages.

#### B. WCPA allows actual damages

RCW 19.86.090 provides:

Any person who is injured in his or her business or property by a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, ... may bring a civil action in the superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee, and the court may in its discretion, increase the award of damages to an amount not to exceed three times the actual damages sustained: PROVIDED, That such increased damage award for violation of RCW 19.86.020 may not exceed ten thousand dollars....

#### VI. Actual damages for multiple garnishments

In all cases in which the defendants garnished the member of the class more than once the clerk was required to issue and did issue a writ which required the garnishee to withhold that sum of money. In all such cases the affidavit was false as to the amount of the judgment (as in all cases) and included an amount in excess

1 of any amount that a garnishment writ could lawfully capture. The measure of  
2 damages is clearly easily ascertainable as the amount in excess of the true  
3 judgment amount less the allowable cost for the instant garnishment i.e. the costs  
4 and attorney fees for the prior garnishment which in all cases had not been  
5 reduced to judgment, together with the additional interest and the additional  
6 attorney fees for garnishment to the extent that they were based upon a percentage  
7 of the judgment. RCW 6.27.100. For all class member the actual damages  
8 sustained was the additional amount of interest attributed to a "judgment" which  
9 included attorney fees and costs that were not in fact a judgment.

10 Dated this 27<sup>st</sup> day of October, 2001

11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25



Michael D. Kinkley